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 9

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA  
 12

13 MARK GABLE,  
 14 Plaintiff,  
 15 v.

16 NATIONAL BROADCASTING  
 COMPANY ("NBC"), a California  
 17 corporation, GREGORY THOMAS  
 GARCIA, an individual AND DOES 1  
 18 through 10, inclusive

19 Defendants.  
 20

CASE NO. CV 08-4013 SVW (FFMx)

The Honorable Stephen V. Wilson

**NOTICE OF MOTION AND  
 MOTION FOR SUMMARY  
 JUDGMENT BY DEFENDANTS;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT  
 THEREOF**

[Declarations of Jill P. Rubin, Jeff  
 Rovin, Ken Neisser, David Gersh, Adam  
 Berkowitz, Gregory Garcia, Sheldon  
 Sroloff, and Ozzie Alvarez; Statement of  
 Uncontroverted Material Facts and  
 Conclusions of Law; and Proposed  
 Order filed concurrently herewith]

Time: 1:30 p.m.  
 Date: January 12, 2009  
 Ctrm: 6

Trial Date: April 21, 2009

1 TO THE CLERK OF THE COURT AND ALL PARTIES AND THEIR  
2 COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on January 12, 2009, at 1:30 p.m., or as soon  
4 thereafter as the matter may be heard in Courtroom 6, located at 312 N. Spring  
5 Street, Los Angeles, CA 90012, Defendants NBC Universal, Inc. (erroneously sued  
6 as "National Broadcasting Company") and Gregory Thomas Garcia will and hereby  
7 do move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order  
8 entering summary judgment in their favor and against Plaintiff Mark Gable on the  
9 First Amended Complaint and all causes of action set forth therein.

10 This motion is made on the ground that Plaintiff's claim for relief for  
11 copyright infringement fails because (1) Plaintiff cannot raise a genuine issue of  
12 material fact that Defendants had access to *Karma!*; and (2) the works at issue as a  
13 matter of law are not substantially similar in copyrightable expression.

14 This motion is made following the conference of counsel pursuant to Local  
15 Rule 7-3, which took place on November 18, 2008. This motion is based upon this  
16 notice of motion; the attached Memorandum of Points and Authorities; the  
17 concurrently submitted Declarations of Jill P. Rubin, Jeff Rovin, Ken Neisser, Adam  
18 Berkowitz, Gregory Garcia, David Gersh, Sheldon Sroloff, and Ozzie Alvarez; all  
19 pleadings and other records on file in this action; and such further evidence and  
20 arguments as may be presented at or before any hearing on the motion. A Statement  
21 of Uncontroverted Material Facts and Conclusions of Law, and a Proposed Order,  
22 are lodged herewith.

23 DATED: December 10, 2008

MITCHELL SILBERBERG & KNUPP LLP

25 By: /s/ Robert H. Rotstein

26 Robert H. Rotstein  
27 Attorney for Defendants  
NBC Universal, Inc., and  
Gregory Thomas Garcia

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1 **I. INTRODUCTION**

2 To prevail in this copyright infringement action, Plaintiff Mark Gable must  
3 prove that Defendants<sup>1</sup> had access to *Karma!* (*i.e.*, had a reasonable opportunity to  
4 read Plaintiff's work) and that Plaintiff's work and Defendants' work are  
5 substantially similar in copyrightable expression. Defendants bring this motion for  
6 summary judgment because Plaintiff, as a matter of law, can establish neither.

7 First, Plaintiff cannot raise an issue of fact as to whether Defendants had  
8 access to his screenplay *Karma!*. Plaintiff alleges that in 1995 and 1996 he mailed  
9 his script to largely unidentified individuals at various talent agencies in Los  
10 Angeles. However, Plaintiff has no proof that he actually sent his script to these  
11 companies, much less that anyone gave his script to any of the Defendants.  
12 Moreover, even if he had, such allegations of "bare corporate receipt" of his script  
13 by these agencies cannot raise an issue of fact as to access under controlling law.  
14 Rather, it is incontrovertible that no one associated with the creation of *My Name is*  
15 *Earl* ever received or read Plaintiff's script.

16 Second, no genuine issue of material fact exists as to whether *Karma!* and *My*  
17 *Name Is Earl* are substantially similar in copyrightable expression. Plaintiff has  
18 evidently sued only because both works use the uncopyrightable ideas of karma and  
19 winning money in a lottery. Far from being similar in copyrightable expression,  
20 however, the works at issue differ in plot, sequence of events, characters, theme,  
21 setting, dialogue, mood, and pace, and thus fail to satisfy the Ninth Circuit's  
22 "extrinsic test" for substantial similarity. Defendants are entitled to summary  
23 judgment for this independent reason.

24  
25  
26 <sup>1</sup> Defendant Greg Garcia created *My Name is Earl*. Defendant NBC Universal, Inc.  
(erroneously sued as NBC) ("NBCU"), is the broadcaster of *My Name is Earl*.

## II. SUMMARY OF UNDISPUTED FACTS<sup>2</sup>

### A. Defendants and Their Television Series *My Name Is Earl*.

Defendant Greg Garcia, the creator of *My Name Is Earl*, is an Emmy-award-winning television writer and producer. UF 1. Before Plaintiff made the claims that led to this lawsuit, Garcia had never heard of Plaintiff; to this day, Garcia has never read, seen, or received a copy of Plaintiff's screenplay. UF 2.

Garcia developed the concept for *My Name Is Earl* in the summer of 2003 while on a family vacation to the shore of North Carolina during a break from *Yes, Dear* (a successful, long-running television series that Garcia created). UF 1. Inspired by the local surroundings and childhood memories of visiting his friend Mike Pennie (now a writer on *My Name is Earl*) at his home in a trailer park, Garcia conceived of the idea for a television show about a likeable loser who has a near-death experience and is motivated to remedy his karma by righting the wrongs of his past. UF 1. During this vacation, Garcia wrote extensive notes containing the basic storyline and characters of the pilot for *My Name Is Earl*. UF 1. Upon returning to Los Angeles, Garcia pitched the concept for his new series to his colleagues at *Yes, Dear*. In the fall of 2004, NBC Universal, Inc. ("NBCU") expressed interest in the series; NBCU eventually agreed to broadcast the series, first airing the pilot on September 20, 2005. UF 3. The series is currently in its fourth season. *Id.*

*My Name Is Earl* is an offbeat situation comedy set in an unspecified middle-American town. Earl, the main character, is in his mid-thirties and is a likeable lifelong ne'er-do-well and petty thief with pronounced "redneck" characteristics.

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<sup>2</sup> A party is entitled to summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Although a court must construe all facts and draw all reasonable inferences therefrom in the light most favorable to the non-moving party, the non-movant must show sufficient evidence to create a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).



1 His main companion is his comic and slovenly yet good-hearted younger brother  
 2 Randy. Earl also maintains a rocky relationship with his fast-talking, trailer-park-  
 3 residing, morally challenged ex-wife Joy.

4 In the pilot, Earl wins \$100,000 from a lottery ticket purchased in a  
 5 convenience store, but loses the ticket when almost immediately thereafter he is hit  
 6 by a car. During recovery in the hospital, Earl has an epiphany while watching a  
 7 late-night talk show on which celebrity host Carson Daly attributes his personal  
 8 good fortune to karma. Earl decides that his own bad luck and disappointing life  
 9 must be the result of bad karma, and that “if [he wants] a better life, [he needs] to be  
 10 a better person.” Earl prepares a “list of everything bad [he’s] ever done” and  
 11 devotes himself to righting his former wrongs. Soon after, Earl’s lost lottery ticket  
 12 is blown into the courtyard of the motel where he lives, landing on his shoe.

13 In each series episode, Earl attempts to “cross off” one or more items on his  
 14 list, assisted by his brother Randy and by Catalina, an attractive young woman who  
 15 works as a maid at the motel. Earl’s ex-wife Joy frequently comically complicates  
 16 Earl’s efforts. Joy’s current husband the seemingly slow-witted, but actually  
 17 extremely intelligent Darnell – sometimes referred to as “Crabman” because he  
 18 works at the local “Crab Shack” hangout – is good-natured toward Earl and often a  
 19 source of insight into the situations that Earl faces.

20 The first three seasons of *My Name Is Earl* consist of sixty-nine such list-  
 21 centered episodes. A representative sample of these episodes follows:

22 **Season One:** In the pilot, Earl provides romantic assistance to a character  
 23 named Kenny, who Earl bullied in elementary school. When Kenny turns out to be  
 24 gay, Earl and Randy must accompany Kenny to a local gay bar. In another episode,  
 25 Earl makes amends for burning down a barn during a childhood stay at a local camp  
 26 for wayward boys. Returning to the camp with Randy, Earl agrees to build the  
 27 camp a new ostrich pen. His plans become complicated, however, when he learns

28



1 that Randy actually caused the fire.<sup>3</sup>

2 **Season Two:** Earl tries to make things right with Millie, a trailer park bully  
3 who Earl tricked into thinking she heard the voice of God. When Millie (who has  
4 since joined a convent) learns of Earl's deception, she loses her faith and moves  
5 back to the trailer park, where she resumes her unfriendly ways. Earl tries to  
6 convince Millie to return to her faith by burning the face of Jesus into a grilled  
7 cheese sandwich and pretending water in a birdbath has turned into wine.  
8 Ultimately, he succeeds and persuades Millie to return to the convent.<sup>4</sup>

9 **Season Three:** Earl goes to prison after taking the blame for a crime that his  
10 ex-wife Joy committed. Even in prison, however, Earl continues to work on his "list  
11 items." One episode focuses on Glen, a fellow inmate who Earl had previously  
12 tricked into initiating an ill-advised home robbery scheme. Earl helps Glen earn his  
13 long-deferred "Camden Scout" badge in "natural sciences" by assisting him with a  
14 bug collection project.<sup>5</sup>

15 **B. Plaintiff and His Screenplay *Karma!***

16 **1. Plaintiff Mark Gable and His Attempts to Submit *Karma!***

17 Plaintiff Mark Gable a/k/a Mark Pizzuti has no professional experience as a  
18

19 <sup>3</sup> Season One episodes also include "Faked My Own Death" (Earl makes amends  
20 for faking his death to avoid breaking up with a woman); "Cost Dad An Election"  
21 (Earl helps his father win an election after causing him to lose one year before);  
22 "Y2K" (Earl makes amends for stealing a "take a number" machine).

23 <sup>4</sup> Season Two episodes also include "Larceny of A Kitty Cat" (Earl helps train a cat  
24 for a cat show to make up for sabotaging a previous show in favor of Joy's cat);  
25 "Robbed A Stoner Blind" (Earl spends a week living an environmentally conscious  
26 life to make amends for stealing from a hippie); "Sticks & Stones" (Earl goes to a  
27 carnival to atone for making fun of a girl's mustache); "Born A Gambler Man"  
(Earl makes 274 bologna sandwiches to make up for stealing sandwiches from  
Kenny when they were young).

28 <sup>5</sup> By the middle of Season Three, Earl has been released from prison, but soon has  
an accident that puts him in a coma for several episodes. During his coma, Earl  
fantasizes that he is in a stereotypical '50s family-style sitcom with his new love  
interest, Billie. By the end of Season Three, Earl has emerged from his coma, and,  
in the final episode, the real Billie forces him to choose between his list and her.

1 writer and has never sold a screenplay. UF 4. Plaintiff alleges he wrote *Karma!* in  
 2 1995. Plaintiff made no direct submission of his script to Greg Garcia or to anyone  
 3 else associated with Garcia or *My Name Is Earl*. UF 5. Indeed, Plaintiff had never  
 4 met Garcia prior to filing this action. UF 2. Rather, Plaintiff claims that around  
 5 1995, he made unsolicited submissions of his script to a number of major talent  
 6 agencies in Los Angeles in the hope of finding representation. Plaintiff has no  
 7 documentary evidence of any of the purported submissions to any talent agency and  
 8 has not proffered any theory of access through any means other than such agencies.  
 9 UF 6.

10 Between 1993 and the spring of 2000, Garcia was represented by Ken Neisser  
 11 of The Gersh Agency (“TGA”). Without documentary support, Plaintiff claims that  
 12 he sent an unsolicited copy of his script to TGA c/o David Gersh in spring 1995.  
 13 David Gersh never represented Greg Garcia (UF 12), and neither Ken Neisser nor  
 14 David Gersh ever saw or read Plaintiff’s script, much less gave it to Greg Garcia  
 15 (UF 6, 9-11). David Gersh has no record of receiving *Karma!*. UF 12. In 1995 and  
 16 at all times since, the policy of TGA has been not to accept unsolicited submissions,  
 17 and in the event that such a submission was received, either to destroy the  
 18 submission or to return to the sender with no copies kept. UF 7.

19 Since the spring of 2000, Garcia has been represented by Adam Berkowitz,  
 20 who was now with Creative Artists’ Agency (“CAA”). Again without documentary  
 21 proof, Plaintiff claims that between spring 1995 and fall 1996 he sent unsolicited  
 22 copies of his script to unidentified persons at William Morris and to CAA.  
 23 However, Mr. Berkowitz never read or saw Plaintiff’s script, much less gave it to  
 24 Greg Garcia. UF 19-20. Neither of these agencies has any record of a submission  
 25 of Plaintiff’s script. It was the policy of these agencies to record receipt of any  
 26 script submitted and to return such scripts to the sender. UF 7, 16-17. Because no  
 27 record exists that Gable submitted *Karma!* to these agencies, the only rational

1 conclusion is that these agencies never received Plaintiff's script.<sup>6</sup>

## 2 **2. Plaintiff's Screenplay *Karma!***

3 Set in the seamier parts of New York City, *Karma!* is a dark, gritty, urban  
4 drama that tells the story of a forty-two-year-old disgraced police detective named  
5 Frankie Augustus. In the opening scenes, Frankie is convicted for taking bribes on  
6 the job, for which he serves a prison sentence. When released from prison, an  
7 unemployed and unkempt Frankie is evicted from his apartment and is reduced to  
8 stealing. However, after stealing a wallet in which he finds the picture of an angel,  
9 Frankie receives a series of visitations by an otherworldly angel figure ("Angel  
10 Man"), who tells him that he must turn his life around because he has accumulated  
11 negative karma, which he is in danger of passing down to his heretofore unknown  
12 unborn son. In this way, *Karma!*'s story has a strong element of the supernatural.

13 In their first encounter, the Angel Man instructs Frankie to meet him the  
14 following night at the gravestone of Frankie's deceased mother. During this  
15 meeting, the Angel Man instructs Frankie that, to "save his [unborn son's] soul," he  
16 must make amends with the people he has hurt in his past (a concept in accordance  
17 with the well-known "twelve-step" programs popularized by Alcoholics  
18 Anonymous),<sup>7</sup> no longer steal or take drugs, get a straight job, and use wisely wealth  
19 that he will soon obtain.

20 *Karma!* contains two major supporting characters: Frankie's older brother,

21  
22 <sup>6</sup> Based on an allegation in the Complaint, Plaintiff might argue that Brad  
23 Copeland, a former writer on *My Name Is Earl*, may somehow have had access to  
24 Plaintiff's script through his agency United Talent Agency ("UTA"). However,  
25 even assuming *arguendo* that Plaintiff can raise an issue of fact that UTA received  
26 his script (which he cannot), or demonstrate that anyone at UTA read his script  
27 (which he cannot), or demonstrate that anyone at UTA gave his script to Copeland  
28 (which he cannot), there is no access through Copeland. Copeland did not meet  
Garcia, obtain employment as a writer on *My Name Is Earl*, or contribute creatively  
to *My Name Is Earl* in any way until after the pilot (the source of the majority of  
Plaintiff's allegedly infringing elements) had already been written and filmed. UF  
21.

27 <sup>7</sup> Upon the Angel Man's reference to making amends, Frankie immediately asks,  
28 "Hey! Isn't that one of the twelve steps of recovery?"

1 Monsignor Anthony Augustus, a virtuous fifty-year-old Catholic priest; and Frankie's  
 2 love interest, Toni Ann, a twenty-seven-year-old over-the-hill model initially  
 3 described as "constantly stoned" who has connections to underworld criminals.  
 4 Frankie seeks out several people he has harmed or mistreated in the past (including a  
 5 former girlfriend, but not the mother of his unborn child), gets a part-time job as a  
 6 bartender, becomes less tolerant of immoral behavior, and begins to give money to  
 7 others rather than continuing to steal and cheat.

8 Frankie also begins to win money in the lottery. Soon after his second  
 9 encounter with the Angel Man, he wins a small prize of three hundred dollars from a  
 10 "scratcher" ticket he buys in a liquor store. Later, toward *Karma!*'s end, he wins  
 11 two million dollars in a Lotto-type jackpot. Frankie arranges for one million dollars  
 12 of these winnings to be donated to an orphanage that burned down in a fire.

13 *Karma!* ends with Frankie's infiltration of a criminal scheme involving a  
 14 large shipment of heroin. Although Frankie is no longer on the police force, he has  
 15 told his former lieutenant that he wants to clear his name by playing the lead role in  
 16 the bust, which the lieutenant permits him to do. Soon after Frankie wins the lottery  
 17 jackpot, a violent scene ensues in which Sonny, a sadistic criminal, orchestrates the  
 18 fatal bombing of a car containing two of Frankie's former police associates. Frankie  
 19 and Sonny, now together in a tractor trailer, plummet from a bridge into a river,  
 20 where they struggle in the water until Sonny gives up. Despite the loss of life,  
 21 Frankie is heralded by his former lieutenant as having "pull[ed] off" the bust. Later,  
 22 back at Toni Ann's apartment, Toni Ann shows Frankie a newspaper headline  
 23 proclaiming "x-bad cop [sic] makes good."

24 At that very moment, however, James Randson, the criminal ringleader,  
 25 arrives at Toni Ann's apartment. A shootout ensues, and although the Angel Man  
 26 materializes to protect Toni Ann, both Frankie and James are mortally wounded. In  
 27 his dying moments, Frankie tells Toni Ann that he will always love her, and the  
 28 screen fades to black. The action reopens in an uncertain location that may be the

“after world.” Frankie opens his eyes and is shown to have “huge white wings like the Angel Man” and to be “clothed like the Angel Man.” The Angel Man tells Frankie, “You fell from grace, you’ve earned them [*i.e.*, the wings] back,” and that it is time to “cross over.” On the final page, Frankie appears as an angel “watching over” Toni Ann at her bedside. After the now-angelic Frankie becomes a “tiny ball of light” that disappears into the sky – *à la* Frank Capra’s *It’s A Wonderful Life* – there is a fadeout.

### III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

“To establish copyright infringement ... [a] plaintiff must show that he owns a valid copyright in his screenplay, and that the defendant ... copied protected elements of it.” *Kouf v. Walt Disney Pictures Television*, 16 F.3d 1042, 1044 n.2 (9th Cir. 1994). To establish unlawful copying, a plaintiff must show both that defendant had access to plaintiff’s work and that there is substantial similarity of protected expression between the copyrighted work and the defendant’s work. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir. 2003); *Kouf*, 16 F.3d at 1044 n.2. Plaintiff cannot raise a genuine issue of fact as to either access or substantial similarity.

#### A. Garcia Created My Name Is Earl Without Access to Karma!

To prove access, a plaintiff must establish that the defendants had a reasonable opportunity to read the plaintiff’s work. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 13.02[A], at 13-19 (1999) (quoted in *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000)). A “bare possibility” of access is not enough. *Jason v. Fonda*, 526 F. Supp. 775, 776-77 (C.D. Cal. 1981), *incorporated by reference*, 698 F.2d 966 (9th Cir. 1982).<sup>8</sup>

<sup>8</sup> Where, as here, a plaintiff cannot show access, summary judgment for the defendant is appropriate unless a plaintiff can adduce evidence that the works at issue are “strikingly similar.” *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003) “Striking similarities” may give rise to an inference of access only where (...continued)

1 In copyright infringement cases, the courts – including this Court as recently  
 2 as 2005 – grant or affirm summary judgment where a plaintiff cannot raise an issue  
 3 of fact as to access. *Merrill v. Paramount Pictures Corp.*, Case No. CV 05-1150  
 4 SVW (MANx), 2005 WL 3955653 (C.D. Cal. Dec. 19, 2005) (Wilson, J.,  
 5 presiding); *see also Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51-52 (2d Cir.  
 6 2003); *Jason v. Fonda*, 698 F.2d 966 (9th Cir. 1982); *Meta-Film Assocs., Inc. v.*  
 7 *MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984). “In order to support a claim  
 8 of access, a plaintiff must offer ‘significant, affirmative and probative evidence.’”  
 9 *Merrill*, 2005 WL 3955653 at \*7 (quoting *Jorgensen*, 351 F.3d at 51 (internal  
 10 citations omitted)). Here, Plaintiff cannot possibly raise a genuine issue of material  
 11 fact as to access.

12 Based on what Plaintiff has indicated in discovery, Defendants anticipate that  
 13 Plaintiff will argue access through his alleged unsolicited submissions to persons  
 14 unknown at CAA and William Morris, and to David Gersh at TGA. If so, his  
 15 argument is frivolous. Although Plaintiff claims that he sent his script to these  
 16 major talent agencies, he can proffer no proof of this other than his unsubstantiated  
 17 assertion. This lack of proof is fatal to his claim. In *Jorgensen*, the Second Circuit  
 18 affirmed the district court’s order granting summary judgment for defendants on the  
 19 issue of access where, as here, the plaintiff (1) “did not maintain a log of where and  
 20 when he sent his work, or keep receipts from certified mailings to establish a chain  
 21 of access,” and (2) produced no “reasonable documentation that he actually mailed  
 22 [tapes of the allegedly infringed work].” 351 F.3d at 52 (internal citations omitted).  
 23 Similarly, in *Merrill*, the plaintiff claimed that he had “mailed copies of his script ...

24 \_\_\_\_\_  
 (...continued)  
 25 the works are “so strikingly similar as to preclude the possibility of independent  
 26 creation.” *Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal.  
 27 1984). However, for all the reasons discussed below, none of the alleged  
 similarities between the two works rises even to the level of substantial similarity,  
 much less to the level of striking similarity. UF 32.



1 to ‘any film studio or record label address he could find,’” including to one of the  
 2 defendants. 2005 WL 3955653 at \*1 (internal citations omitted). However, like  
 3 Plaintiff here, the plaintiff in *Merrill* did not provide any documentary evidence to  
 4 show that he had mailed his script to the defendants, or to any person associated  
 5 with defendants, before the defendants created a treatment for the allegedly  
 6 infringing work. *Id.* at \*8-9. Also like Plaintiff here, the plaintiff in *Merrill* could  
 7 not recall exactly when his alleged submissions had been made. *Id.* at \*8-9. Stating  
 8 that “lack of documentation” regarding submission of plaintiff’s script prior to  
 9 defendants’ creation of their work “mitigates in favor of summary judgment,” this  
 10 Court found that the plaintiff could not “survive summary judgment merely by  
 11 stating that he sent [his script] at unspecified times to corporate ... addresses.” *Id.*

12 Neither can Plaintiff raise an issue of fact as to access merely because he  
 13 purportedly sent his script to agencies that employed agents for Garcia. It is  
 14 uncontroverted that Plaintiff never sent his script to Garcia’s agents, Adam  
 15 Berkowitz and Ken Neisser, but only purportedly to others who worked at these  
 16 agencies. In granting summary judgment in *Merrill*, this Court recognized that  
 17 “bare corporate receipt” of plaintiff’s work by a corporate entity with some  
 18 connection to defendants was insufficient to preclude a finding of summary  
 19 judgment. 2005 WL 3955653 at \*9; *accord, Jorgensen*, 351 F.3d at 53, 53 n.5; *see*  
 20 *also Meta-Film*, 586 F. Supp. at 1357-58. As the court in *Meta-Film* noted,  
 21 “countless unsolicited scripts are submitted to numbers of individuals [at  
 22 entertainment companies] every day. Under these circumstances, it is clearly  
 23 unreasonable to attribute the knowledge of one individual – especially a non-  
 24 employee – to every other individual [at the same entertainment company].” 586 F.  
 25 Supp. at 1357-58. It follows that even if Plaintiff could establish that he sent his  
 26 scripts to the talent agencies, he cannot raise a genuine issue of material fact as to  
 27 access.

28 In addition, even putting aside the legal deficiencies in Plaintiff’s corporate



1 receipt theory, the incontrovertible evidence establishes that none of the Defendants  
 2 had access to his *Karma!* script. In *Meta-Film*, the court held that a plaintiff's  
 3 submission of his script to a director who maintained an office at a studio with  
 4 which he was under contract failed to create a genuine issue that the studio had  
 5 access to the script when it produced an allegedly infringing film. 586 F. Supp. at  
 6 1357-58. Instead, the court found that such claims of access require a "nexus  
 7 between the defendant and the individual possessing knowledge of the plaintiff's  
 8 work" or an "intermediary." *Id.* at 1355. This intermediary must have been either  
 9 (1) "a supervisor with responsibility for the defendant's project"; (2) a "part of the  
 10 same work unit as the copier"; or (3) someone who "contributed creative ideas or  
 11 material to the defendant's work." *Id.* at 1355-56. And, "at minimum, the dealings  
 12 between the plaintiff and the intermediary and between the intermediary and the  
 13 alleged copier must involve some overlap in subject matter to permit an inference of  
 14 access." *Id.* at 1358. Plaintiff can satisfy none of these factors as a matter of law.

15 Plaintiff's flawed access theory is analogous to the access theory that this  
 16 Court rejected in *Merrill*. There, the plaintiff alleged that he had sent his script to  
 17 MTV, a distributor of the allegedly infringing work, and to the fan club for Britney  
 18 Spears, star of the allegedly infringing work. *Merrill*, 2005 WL 3955653 at \*8-9.  
 19 This Court found that there was no evidence that MTV had received a copy of his  
 20 script before creation of the allegedly infringing work or that MTV had involvement  
 21 in the creative process. As to the fan club, the Court held that plaintiff could not  
 22 establish that the fan club received the script or forwarded it to the defendants. To  
 23 the contrary, "Defendants [had] presented uncontroverted evidence that the fan club  
 24 was not authorized to accept unsolicited materials ... and that the Spears  
 25 management team had a policy of not accepting unsolicited materials from any  
 26 source." *Id.*

27 In light of the foregoing authorities, Plaintiff's speculative assertion of access  
 28 based on submission to the talent agencies is futile. Greg Garcia, his current agent

1 Adam Berkowitz, and his former agent Ken Neisser have all testified that they never  
 2 read or even had possession of Plaintiff's script. Moreover, neither Berkowitz nor  
 3 Neisser had a creative role in *My Name is Earl*.<sup>9</sup> More than that, none of the  
 4 agencies has a record of receiving *Karma!*, and all had policies that unsolicited  
 5 scripts would not be read. Both agencies at which Berkowitz has worked  
 6 maintained records of scripts submitted, and neither has a record of ever having  
 7 received Plaintiff's script. In sum, Defendants are entitled to summary judgment  
 8 because Plaintiff, as a matter of law, cannot establish access to his script.

9 **B. *My Name is Earl* and *Karma!* are not Substantially Similar in**  
 10 **Copyrightable Expression.**

11 Even assuming *arguendo* that Plaintiff could raise an issue of fact as to  
 12 access, Defendants are entitled to summary judgment for a second, independent  
 13 reason: Plaintiff cannot raise a material fact as to substantial similarity of  
 14 copyrightable expression. The Ninth Circuit has established a two-part test, known  
 15 as the "extrinsic" and "intrinsic" tests, to determine whether two works are  
 16 substantially similar in protected expression. In deciding a motion for summary  
 17 judgment, however, the Court evaluates and applies only the "extrinsic" test, which  
 18 "involves an objective comparison of the two works." *Merrill*, 2005 WL 3955653  
 19 at \*9; *see also Funky Films, Inc. v. Time Warner Entm't. Co., L.P.*, 462 F.3d 1072,  
 20 1077 (9th Cir. 2006). Only the extrinsic test, which "examines not only similarity of  
 21 ideas but also objective similarity of expressions" is relevant for summary judgment.  
 22 *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1477 (9th Cir. 1992); *see*  
 23 *also Funky Films*, 462 F.3d at 1077; *Merrill*, 2005 WL 3955653 at \*9. A "plaintiff  
 24 who cannot satisfy the extrinsic test necessarily loses on summary judgment,  
 25 because a jury may not find substantial similarity without evidence on both the  
 26 extrinsic and intrinsic tests." *Kouf*, 16 F.3d at 1045.

27 <sup>9</sup> Indeed, Neisser ceased being Garcia's agent long before Garcia conceived of *My*  
 28 *Name is Earl*.

When conducting the extrinsic test, a court must review the works at issue. *Kouf*, 16 F.3d at 1045 (approving district court’s “conscientious[] outline[]” of the two works at issue). To aid the court’s inquiry under the extrinsic test, expert testimony and analytic dissection are appropriate. *Sid & Marty Krofft*, 562 F.2d at 1164. In literary works like those at issue here, the extrinsic test focuses on “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.” *Rice*, 330 F.3d at 1174 (quoting *Kouf*, 16 F.3d at 1045). Copyright does not protect ideas, but only the expression of those ideas. *Rice*, 330 F.3d at 1174; *Kouf*, 16 F.3d at 1045; *Berkic v. Crichton*, 761 F.2d 1289, 1293-94 (9th Cir. 1985). Neither does copyright protect so-called *scènes à faire* – standard treatments or clichés that flow from common unprotectable ideas. *Rice*, 330 F.3d at 1175; *Berkic*, 761 F.2d at 1293. Therefore, the Court “must take care to inquire only whether the *protectable elements, standing alone*, are substantially similar,” *Cavalier v. Random House*, 297 F.3d 815, 822 (9th Cir. 2002) (quoting *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (emphasis in original)), and must “filter out and disregard the non-protectable elements,” such as “scenes a faire, which flow naturally from generic plot-lines.” *Funky Films*, 462 F.3d at 1077.

As the authorities cited above show, courts frequently sustain summary judgment for defendants under the extrinsic test. Indeed, this Court three years ago granted summary judgment under the extrinsic test. In *Merrill*, plaintiff alleged a number of similarities between his script *Dream Alive* and defendants’ film *Crossroads*. 2005 WL 3955653 at \*10-11. Although the Court recognized that both scripts involved, for example, groups of young people who travel across the country, a female lead who sings at an audition, a romance with a male lead with a vintage car, a father who resists the female lead’s singing career, a fight scene, and a character’s infidelity, the Court, applying the extrinsic test, concluded that no reasonable jury could find the works to be substantially similar. *Id.* at \*9-14.

1                   **1.     There are no Substantial Similarities Between *Karma!* and**  
 2                   ***My Name is Earl* Under the Extrinsic Test.**

3           A comparison of the plot, sequence of events, theme, setting, characters,  
 4 dialogue, pace, mood and tone in *Karma!* and *My Name is Earl* reveals that, as a  
 5 matter of law, the works share no substantial similarity in protected expression.  
 6 (For a detailed discussion of the lack of substantial similarity, see Declaration of Jeff  
 7 Rovin (“Rovin Decl.”)).

8                   **a.     Plot and Sequence of Events.**

9           At the level of copyrightable expression, the plots of the works at issue here  
 10 differ markedly. *Karma!* is a melodramatic story of a corrupt ex-cop who has been  
 11 visited by an angel and instructed to change his bad ways for the sake of his unborn  
 12 son’s karma. Frankie makes no list of bad deeds or of people with whom he must  
 13 make amends, and *Karma!* does not focus on his efforts to make amends. Rather,  
 14 although Frankie makes a few haphazard attempts to reconcile with others, the plot  
 15 actually focuses on his involvement in a successful drug sting operation. Only  
 16 relatively late in the script does Frankie win two million dollars in the lottery (and,  
 17 unlike Earl, does not lose his ticket), half of which he gives to his priest brother to  
 18 rebuild an orphanage. Frankie is then slain by a drug lord and is escorted to Heaven  
 19 by the Angel Man, eventually becoming Toni Ann’s guardian angel.

20           In contrast, *My Name is Earl*, which follows the story of Earl Hickey and his  
 21 friends and family, is a lighthearted half-hour comedy series rife with farce and  
 22 slapstick humor. After purchasing a winning lottery ticket in a convenience store  
 23 and immediately losing the ticket after being hit by a car outside the store, Earl, a  
 24 likeable ex-petty thief, sees Carson Daly on television speaking about karma. Earl  
 25 decides that his bad deeds were the reason he has lost the lottery ticket, and more  
 26 generally are the cause of his terrible life. As a result, Earl resolves to become a  
 27 better person in order to improve his lot in life. Soon after making this decision, the  
 28 missing lottery ticket reappears on Earl’s shoe. With the practical merits of good

1 behavior confirmed for Earl, he makes (and throughout the series, continues to add  
 2 to) a written list of every bad deed he has committed throughout his life and resolves  
 3 to rectify each precise wrong until all his list items are exhausted. Despite  
 4 Plaintiff's allegation to the contrary, there is nothing even remotely resembling this  
 5 list in *Karma!*. As a matter of law, no reasonable person could find the plots of the  
 6 two works substantially similar.

7 In addition, the sequences of events in the two works are entirely dissimilar.  
 8 *Karma!* is told almost entirely chronologically. It moves slowly through the plot  
 9 points and character issues as Frankie is arrested for bribery, serves a prison  
 10 sentence, becomes a virtual derelict, is visited by a supernatural being, and seeks  
 11 salvation for the sake of his unborn son by becoming involved in a law enforcement  
 12 sting operation. The story ends with Frankie's violent death and transformation into  
 13 an angel. This sequence of events is entirely without equivalent in *My Name Is*  
 14 *Earl*, which is rarely presented with a straightforward timeline and instead pauses  
 15 for frequent flashbacks and dream sequences, as well as unrelated subplots.  
 16 Moreover, even on the few occasions where an event in one script has a vague and  
 17 uncopyrightable "counterpart" in the other, these events occur in radically different  
 18 positions and serve different functions. For example, in *Karma!*, Frankie wins a  
 19 large lottery prize only at the *end* of the script, as if being rewarded for having  
 20 changed his ways. In contrast, in *My Name Is Earl*, the pilot episode *begins* with an  
 21 unreformed Earl buying a winning lottery ticket, and it is his experience with this  
 22 ticket that brings about his decision to change. As another example, in *Karma!*  
 23 Frankie serves a prison sentence for his actual crimes at the beginning of the story  
 24 and before the angel intervenes (an event without corollary in *My Name Is Earl*). In  
 25 *My Name is Earl*, not until the third season does Earl *willingly* serve a prison  
 26 sentence for a crime he did not commit, long after his decision to make a radical  
 27 change in his life.

28 As noted, Plaintiff seems to have brought this lawsuit simply because he

believes that both works involve the ideas of karma and using money from lottery winnings or other prize money for good. However, such abstract plot ideas are not copyrightable. *Berkic*, 761 F.2d at 1293 (“General plot ideas ... remain forever the common property of artistic mankind.”); *see also Funky Films*, 462 F.3d at 1081 (“[g]eneral plot ideas are not protected by copyright law; they remain forever the common property of artistic mankind.” (quoting *Berkic*, 761 F.2d at 1293)); *Cavalier*, 297 F.3d at 822 (“basic plot ideas ... are not protected by copyright law”); *Weygand v. CBS, Inc.*, 43 U.S.P.Q.2d (BNA) 1120, 1125, 1125 n.18 (C.D. Cal. May 21, 1997) (“general plot idea of an African-American farmer who takes in a white child” is not protected because “[b]asic plot ideas are not protectable”).<sup>10</sup>

Thus, other than a few generic uncopyrightable ideas (e.g., a protagonist whose change is somehow related to karma, use of lottery winnings, and prison sentences as plot devices), the plots and sequences of events of the two works are expressed in entirely dissimilar ways.

#### **b. Characters.**

The characters in the two works are wholly dissimilar. The main characters of the two works (Frankie in *Karma!* and Earl in *My Name Is Earl*) bear no

<sup>10</sup> The basic ideas of karma and the search for redemption are not copyrightable and indeed are found in various combinations in numerous prior works, including Charles Dickens’ classic story *A Christmas Carol* (1843); Lafcadio Hearn’s and Paul Carus’s respective short stories entitled *Karma* (respectively 1890 and 1894); the television series *Highway to Heaven* (1984); the motion picture *Almost An Angel* (1990); the television series *Xena: Warrior Princess* (1995); the television series *Forever Knight* (1992); and the comic book series *Plasticman* (1941). *See* Rovin Decl., Ex. 1 at 11-29.

Similarly, the generic plot idea of using money from lottery winnings or other prize money for good is a general idea and *scène à faire* that is not entitled to copyright protection. *See* Rovin Decl., Ex. 1 at 18-19. Works that feature a plot line in which money from a winning lottery ticket is used for the better include the 1931 film *Le Million* (self-absorbed young man wins lottery, loses ticket, and learns life lessons as he pursues the ticket), the Mary Higgins Clark novel *Weep No More, My Lady* (woman becomes amateur detective after winning lottery), the comic book *Flash*, Vol. 2 #1, 1987 (superhero unable to afford to do good until he wins the lottery); the 1994 motion picture *It Could Happen To You* (a New York City police officer wins the lottery and shares the ticket with a woman with whom he falls in love). *Id.*



1 resemblance to each other. Frankie is a disgraced New York City ex-cop and ex-  
 2 con in his mid-forties with a bitter attitude, foul mouth, and short temper who is a  
 3 seasoned extortionist and who was kicked off the police force for corruption. After  
 4 a visitation by an angel, Frankie is instructed to go on a search for redemption in  
 5 order to improve the karma of his unborn son, a journey that ends in his violent  
 6 death.

7 In contrast, Earl is an early thirties “redneck” and likable loser with a positive,  
 8 humorous attitude towards life. Earl is neither an ex-police officer (or a current  
 9 police officer) nor a skilled shakedown artist, but rather a bumbling ex-petty thief  
 10 seeking reform. He does not die, has no unborn son, receives no otherworldly  
 11 visitation, and has a wholly self-imposed character transformation as a practical  
 12 means to improve his own day-to-day wellbeing.

13 In his pleadings and discovery responses, Plaintiff compares Frankie’s older  
 14 brother Monsignor Anthony Augustus, a “50 year old Italian Catholic Priest,” to  
 15 Earl’s younger brother Randy, a bumbling unemployed thief who has slept on Earl’s  
 16 couch for years. In fact, these characters could not be more different. The  
 17 Monsignor in *Karma!* is wise, moral, articulate, intelligent, a Catholic priest, and an  
 18 upstanding member of the community. By comparison, Randy is a good-natured but  
 19 simple young man who has aided Earl in his past petty crimes, but who now helps  
 20 Earl cross off items on his list, thus becoming caught up in Earl’s escapades.

21 Plaintiff further compares Toni Ann, Frankie’s love interest, with Joy, Earl’s  
 22 ex-wife. However, these characters are quite different as well. Toni Ann is a “27  
 23 year old wanna be model” from New York who also works as a drug dealer. She is  
 24 “constantly stoned” on marijuana and heroin. By comparison, Joy is a comedic  
 25 character who speaks with a marked southern accent, is not Earl’s “love interest,”  
 26 does not do drugs, is not a model, and lives in a trailer with her new husband  
 27 Darnell and her children.

28 Plaintiff also compares his character Shrimp, a “23-year old punk kid of Afro-



American background” from the streets of New York, with *My Name is Earl*’s Darnell, Joy’s new husband, who works at the Crab Shack (hence his nickname “Crabman”). Apparently, Plaintiff makes this allegation because both nicknames refer to crustaceans and both characters are African American. However, Shrimp is a hostile, crude-speaking youth who is an aspiring street thug. He is called “Shrimp” not because of some reference to seafood, but because he is small in stature. In contrast, Darnell, who lives with Joy in a trailer park, is unexpectedly erudite, graduated from college at 14, speaks several languages, often displays flashes of wit, plays the cello, has a pet turtle, and is otherwise a mystery because he is part of the Witness Protection Program. Darnell is calm and scrupulously moral. He is called “Crabman” occasionally because he works at a crab shack. That two characters are African American, is not a similarity. Clearly, Shrimp and Darnell are entirely different characters.<sup>11</sup>

Furthermore, both works contain characters that have no conceivable counterpart in the other work, and Plaintiff has not contended otherwise. For example, there are no claims of alleged counterparts in *My Name is Earl* to the following characters in *Karma!*: the prominent character of the “Angel Man,” Lieutenant Sowers, Detective Skinnerd, Detective Dawgs, and Sharon the Waitress. Nor are there claimed counterparts in *Karma!* to the following recurring characters in *My Name Is Earl*: Catalina, Patty the Daytime-Hooker, Willie the One-Eyed Mailman, and Earl’s father Carl Hickey. Taken individually or cumulatively, the characters in the works are not substantially similar.

<sup>11</sup> Plaintiff concocts other purported similarities of characters, all to no avail. For example, the character of Coco in *Karma!* is a young drug-using female friend of Toni Ann, who features prominently throughout *Karma!*, while the character of Steve Coco is a male friend of Earl mentioned only in passing and never seen on screen. Likewise, the character of Mrs. Stewart, Frankie’s “sweet 48 year old” landlady, could hardly be more different from the character of the hapless police officer *Stuart Daniels* in *My Name is Earl*. Moreover, names are not copyrightable. *Trenton v. Infinity Broad. Corp.*, 865 F. Supp. 1416, 1426 (C.D. Cal. 1994) (“...the regulations of the Copyright Office expressly provide that ‘[w]ords and short phrases such as names, titles and slogans’ are not subject to copyright.”).

1 **c. Dialogue.**

2 “[E]xtended similarity of dialogue [is] needed to support a claim of  
3 substantial similarity based upon this issue.” *Olson v. Nat’l Broad. Co.*, 855 F.2d  
4 1446, 1450 (9th Cir. 1988); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1185  
5 n.67 (C.D. Cal 2001) (“[p]laintiffs again confuse the ‘idea’ conveyed by a particular  
6 piece of dialogue with the protectable ‘expression’ thereof.”). There is no  
7 substantial similarity in dialogue between *Karma!* and *My Name is Earl*.<sup>12</sup> Most  
8 significantly, the language of *Karma!* is rooted in the urban street and employs  
9 vernacular with a considerable amount of profanity (something that never occurs in  
10 *My Name Is Earl*). For example, Teenager #2 tells Frankie, “Look holmes [sic]!  
11 you’re messin’ with the wrong mother fucker.” When Frankie replies to him, “Just  
12 relax, everything’s dope,” Teenager #2 responds that Frankie “should mind [his]  
13 own business before [he gets] wacked [sic].” In contrast, the dialogue in *My Name*  
14 *Is Earl* is generally good natured and is riposted for comedic effect. For example,  
15 when Earl tries to replace Joy’s broken childhood beauty pageant trophy, Joy  
16 demands a hot tub instead. (“That little girl is gone now,” she quips, “and the  
17 woman that took her place wants to sit and drink rum in 106-degree water.”) There  
18 exists no similarity in dialogue, much less a substantial one, between the two works.

19 **d. Setting.**

20 The settings for the two works also differ. *Karma!* is set specifically in the  
21 gritty underbelly of New York City, in a primarily nocturnal world of dark alleys,  
22 seedy bars, and rundown apartments. Other scenes depict lavish and decadent urban  
23 nightlife (e.g., a party at James Randson’s penthouse apartment). In contrast, *My*  
24

25 <sup>12</sup> Plaintiff’s transparent attempt to invent similarities where none exists is  
26 exemplified by his interrogatory response in which he claims that dialogue in  
27 *Karma!* where the Angel Man reprimands Frankie for saying “Well I’ll be damned”  
28 is similar to a scene where Mrs. Balboa cautions Earl about his swearing when he  
remarks, “She [Joy] only got one figure and I blew it up. Damn.” (“Broke Joy’s  
Fancy Figurine”). It is difficult to imagine a type of dialogue that could be less  
original or less protectable.

1 *Name Is Earl* is set in generic middle-American suburban locales that are typically  
 2 bathed in sunlight. Stories unfold in strip malls, motor inns, and trailer parks, which  
 3 although often inelegant, are neither lush and expensive nor rundown or threatening  
 4 (e.g., the motel where Earl and Randy live, Joy and Darnell's kitschy trailer, the  
 5 appliance store where Earl gets a job, and even the prison where Earl has landed  
 6 after taking the blame for Joy's crime). There exists simply no similarity in setting,  
 7 much less a substantial one, between the two works.

8 **e. Pace.**

9 The two works are not paced in a similar manner. In *Karma!*, characters are  
 10 introduced slowly with a considerable amount of exposition. They are depicted in  
 11 their raw, unreformed states before the Angel Man arrives and places Frankie on the  
 12 path that will force his character development and the development of the characters  
 13 who surround him. Frankie is rarely off stage, and, after the opening montage, the  
 14 narrative occurs more or less in the context of Frankie's on-screen time. After  
 15 Frankie gets out of jail, the story appears to unfold in less than a week. Conversely,  
 16 *My Name Is Earl* presents and resolves almost every individual story in episodes  
 17 that run roughly twenty minutes each, and little time is spent on character nuance.  
 18 Each episode is almost entirely about plot and plot twists, each of which is  
 19 classically structured in three acts of more-or-less equal length (due to the  
 20 positioning of commercial breaks): (1) a problem is presented, (2) complications  
 21 are added, and (3) the situation is improbably resolved. Viewers learn, at best, only  
 22 a little about the characters each week. Thus, the plots move forward at a rapid pace  
 23 with little exposition (unlike *Karma!*). The unfolding of Earl's quest for redemption  
 24 takes place primarily over at least a year, during which time Joy becomes pregnant  
 25 and gives birth, and over an even longer period when considering the flashbacks to  
 26 Earl's childhood. There exists no similarity in pace, much less a substantial one,  
 27 between the two works.

1 **f. Theme.**

2 While both works deal with the uncopyrightable themes of karma and  
 3 redemption, *Karma!* deals with redemption that is forced upon Frankie by a mystical  
 4 outside source (the “Angel Man”), in an attempt to fix the karma of Frankie’s  
 5 unborn son. Conversely, Earl draws his own personal conclusions about karma and  
 6 comes to his own decisions about changing his ways to improve the day-to-day  
 7 quality of his life. There is no outside spiritual voice that commands Earl to  
 8 improve his karma – rather, when good things happen to Earl, they could simply be  
 9 coincidence or the result of his giving up a more dangerous life. (Indeed, in contrast  
 10 to Plaintiff’s script, Earl’s entire belief in karma may be an illusion.) The themes of  
 11 compelled redemption for the sake of another and voluntary redemption for entirely  
 12 self-serving (albeit comically endearing) reasons are entirely dissimilar.

13 **g. Mood and Tone.**

14 The mood and tone of the two works could not be more dissimilar. The  
 15 pervasive hard-core gangsterism and dark and threatening street life of *Karma!* are  
 16 reflected in the generally grim nature of most of its characters, while *My Name Is*  
 17 *Earl* is relentlessly light and silly. There is no tragedy in *My Name Is Earl*, and not  
 18 even Earl’s coma (with its ’50s-sitcom dream sequences) or jail time (with  
 19 skinheads who request umbrellas to avoid sunburn) discourages the quirky good  
 20 humor of the series. The works are not substantially similar in mood or tone.

21 For all of these reasons, application of the extrinsic test demonstrates that  
 22 Plaintiff cannot, as a matter of law, establish copyright infringement. Defendants  
 23 are therefore entitled to summary judgment.

24 **2. A List of Random, Scattered Elements Does Not Give Rise to**  
 25 **Substantial Similarity.**

26 In discovery, Plaintiff has nevertheless set forth a litany of random, scattered  
 27 elements that supposedly give rise to substantial similarity. Plaintiff’s list cannot  
 28 raise a genuine issue of material fact. *See Cavalier*, 297 F.3d at 825 (“a compilation

1 of ‘random similarities scattered throughout the works’ is ‘inherently subjective and  
 2 unreliable,”) (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)  
 3 (internal citations omitted)); *Kouf*, 16 F.3d at 1045-46 (rejecting plaintiff’s  
 4 “compilation of ‘random similarities throughout the works’ such as a lawnmower  
 5 scene, a sprinkler scene, the presence of an attic, danger scenes, concerned parents,  
 6 and kids sleeping outside overnight.”) (internal citations omitted). *See also Scott-*  
 7 *Blanton v. Universal City Studios Prods. LLP*, 539 F. Supp. 2d 191, 201 (D. D.C.  
 8 2008) (rejecting plaintiff’s list containing over 50 elements that were alleged to  
 9 establish substantial similarity); *Chivalry Film Prods. v. NBC Universal, Inc.*, No.  
 10 05 Civ. 5627 (GEL), 2006 WL 3780900 at \*2 (S.D.N.Y. Dec. 22, 2006) (granting  
 11 summary judgment for defendants, stating, “[p]laintiff attempts to show similarity  
 12 by providing a long chart of alleged similarities between specific scenes ... For  
 13 example, in [defendants’ work] the fiancée’s father ridicules his prospective son-in-  
 14 law’s car, and in [plaintiff’s work] the abusive landlord is critical of his tenant’s  
 15 vehicle. Even if the scenes were otherwise similar, there is nothing original in either  
 16 scene.” (internal citations omitted).

17 In *Funky Films*, the Ninth Circuit once again rejected such an approach. The  
 18 plaintiffs alleged, and the Court accepted as true, the following similarities:

19 [B]oth works concern “a narrative about a small funeral home, and the  
 20 lives of the people who operated it”; plot lines involving “the death of  
 21 the father ... [who] has for decades run the business”; a father whose  
 22 death is “unexpected and not attributable to natural causes” ... and the  
 23 presence of his “two sons” who receive equal shares of the business,  
 24 with the “older son ... liv[ing] in a distant city, working outside the  
 25 funeral industry”; in both works an older son initially “has no interest  
 26 in becoming involved with the funeral business”; moreover, [t]he  
 27 “family business is financially fragile and in both works the funeral  
 28 home is pointedly shown to be in debt and operating out of a

1 substandard facility with obsolete equipment and a hearse that stalls.”  
 2 Both works also contain an attempt by a “rival funeral home,”  
 3 spearheaded by “the female principal of the rival business” to “take []  
 4 advantage of their vulnerable financial condition,” “bluntly mak[ing]  
 5 a lowball offer” and “approaching one of the brothers at the father’s  
 6 funeral with a proposal to buy the family business.” In both works,  
 7 the older brother who initially “expresses his desire to sell” but  
 8 “changes his mind and commits to help his brother keep the business  
 9 afloat.” Finally, ... the older brother’s creativity ... stands “in pointed  
 10 contrast to the leaden conservatism of the younger brother”; ... the  
 11 funeral home used as a “site for musical entertainment”; ... the  
 12 “younger brother ... change[s] his church affiliation in order to  
 13 increase their client base” in both works; and the “rival’s takeover  
 14 attempt does not succeed.”

15 462 F.3d at 1077-78. The *Funky Films* court stated, “[a]t first blush, these apparent  
 16 similarities in plot appear significant,” but nevertheless affirmed the district court’s  
 17 order granting summary judgment, finding “few real similarities at the levels of plot,  
 18 characters, themes, mood, pace, dialogue, or sequence of events.” *Id.* at 1078.

19 When those factors were examined on a concrete level, rather than an “abstract  
 20 level,” the requisite substantial similarity of protected expression was absent. *Id.*

21 Plaintiff’s list of scattered similarities is both inaccurate and insufficient to  
 22 raise a genuine issue of material fact as to substantial similarity. For example,  
 23 Plaintiff has listed “corresponding” scenes regarding “crossing over” to the afterlife  
 24 as demonstrating the similarity of the two works. However, the markedly different  
 25 treatment in the two works of this stock scene, common in the prior art,<sup>13</sup> serves  
 26

27 <sup>13</sup> *E.g., Here Comes My Jordan* (character dies and travels to a misty realm where  
 28 he speaks with men in suits regarding his transition to Heaven) (1941); *Heaven Can Wait* (same) (1978); *Down To Earth* (same) (2001); *Almost An Angel* (character  
 (...continued)



1 only to underscore the dissimilarities between *Karma!* and *My Name Is Earl*. In  
 2 *Karma!*, Plaintiff uses the hackneyed cliché of a heavenly representative escorting  
 3 the protagonist to the “other side” as the earnest and melodramatic conclusion to  
 4 Frankie’s journey for redemption. In *My Name Is Earl*, the relevant scene is merely  
 5 part of Earl’s in-coma dream sequence of a ’50s-style family sitcom life and a  
 6 tongue-in-cheek parody of the cliché, complete with swirling mist and a knock at the  
 7 door by a transportation professional to escort him on his heavenly journey (an offer  
 8 he refuses). Similarly, Plaintiff alleges that the presence of scenes in prison in both  
 9 works demonstrates the similarity of the works. However, even aside from the  
 10 marked dissimilarity of the prison scenes (*scènes à faire* in works involving  
 11 criminals) in both works – the prison in *Karma!* is a dark and threatening location,  
 12 while the prison in *My Name Is Earl* is a lighthearted location complete with  
 13 friendly guards and skinheads who only want umbrellas to go outside for recreation  
 14 – such stock settings as a prison are wholly unprotectable. *See, e.g., Scott-Blanton*,  
 15 539 F. Supp. 2d at 202 (“Indeed, the public domain would have a scant selection if  
 16 stock settings such as the movie theatre, the kitchen, Las Vegas, a church picnic or a  
 17 club were subject to copyright protection.”).

18 Moreover, as a general matter, Plaintiff’s list of purported similarities would  
 19 prove too much. Accepting Plaintiff’s technique of concocting lists of scattered  
 20 similarities would lead to the conclusion that in writing *Karma!*, Plaintiff himself  
 21 infringed the copyright in earlier works. For example, in the popular NBC  
 22 television series *Highway to Heaven* (1984-1989), a lead character is, like Frankie in  
 23 *Karma!*, a hard drinking big city ex-cop who is confronted by an angel and teams up  
 24 with him to turn his life around and do good. Application of Plaintiff’s flawed  
 25 methodology to his own work and to *Highway to Heaven* yields more than seventy  
 26

27 (...continued)  
 28 believes he is dying and has a vision of traveling to a misty realm where he  
 discusses whether it is his time to “cross over”) (1990). *See* Rovin Decl. Ex. 1 at 23.



1 “similarities” between the two works. *See* Rovin Decl. Ex. 1 at Appendix 2.  
 2 Likewise, in the Paramount Pictures’ film *Almost An Angel*, first released in 1990,  
 3 the protagonist is, like Frankie in *Karma!*, a foul-mouthed small time thief who  
 4 serves a prison sentence, encounters a heavenly figure who tells him to change his  
 5 ways, redeems his past bad behavior, donates a fortune to a priest in a church,  
 6 spends time in a bar, arranges for a donation to a children’s center, and finally learns  
 7 he is an angel at the end, among other “similarities.” Indeed, a similar comparison  
 8 can be made between Plaintiff’s work and Dickens’ classic story *A Christmas Carol*.  
 9 For example, to cite only a few similarities in both stories, a supernatural being  
 10 appears to a protagonist who is initially motivated by money, both stories contain a  
 11 reference to prison, both protagonists have a pious male relative, and both contain a  
 12 protagonist who looks at an illustration of an angel. *See* Rovin Decl. Ex. 1 at  
 13 Appendix 1. Summary judgment is mandated under the extrinsic test.

#### 14 **IV. CONCLUSION**

15 As demonstrated above, Plaintiff cannot show either access or substantial  
 16 similarity under the extrinsic test, as a matter of law. Accordingly, Defendants  
 17 respectfully request that their motion for summary judgment be granted.

18  
 19 DATED: December 10, 2008

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20  
 21 By: /s/ Robert H. Rotstein

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